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Preliminary Analysis— Intelligence Executive Orders

Editor's Note: The Standing Committee on Law and National Security is in the process of preparing a report on the new executive orders on intelligence, Executive Orders 12333 and 12334, under the supervision of a subcommittee consisting of Axel Kleiboemer, Larry H. Williams and Daniel B. Silver. The report will consist of a section by section comparison of the two orders with their predecessor, Executive Order 12036, together with commentary on the significance of the changes. The following discussion of the principal features of the new orders is drawn from the subcommittee's current draft introduction to the report. It is not intended to be definitive and readers will have to await the full report for a complete interpretive analysis. The committee has not had an opportunity to study the content of this preliminary discussion. Hence, it is published for information.

Despite the numerous differences between Executive Orders 12333 and 12334 and the previous order, perhaps the most significant phenomenon is that these new orders retain in very large part the structure and substance of regulation established under the previous administration.

There were many in the new administration, and in the transition teams and outside organizations advising them, who advocated the abolition of Executive Order 12036, or its replacement by significantly less restrictive provisions than the orders the president ultimately adopted. It appears, from analysis of the new executive orders, that the more radical changes advocated by this group may have been forestalled by a number of cosmetic changes and modifications of tone whose significance is less real than apparent. In terms of the historical development of intelligence law by executive order (i.e., a publicly announced framework of rules to govern intelligence activities), the most important aspect of the new executive orders thus is the aspect of continuity they present, rather than the changes they embody.

A new administration, having assumed office on a platform, *inter alia*, of removing restrictions on the intelligence agencies, nonetheless has left in place the basic structure of regulation created under the previous administration (including a special office within the Justice Department devoted to this function) and many (although clearly not all) of the substantive restrictions. As a result, it seems unlikely that any future administration will be inclined to dismantle the existing structure of regulation or feel free to do so.

A second preliminary observation is that the structure adopted in the new executive orders makes it very difficult to evaluate the significance of many of the changes that were made. The previous executive order provided a variety of principles, limitations, and restrictions, to be amplified in procedures adopted by

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Intelligence Identities Protection Act

The House passed H.R. 4, the Intelligence Identities Protection Act, in September 1981. The Senate passed a similar version of the Act in March 1982. It was anticipated that there would be little difficulty in reconciling the two versions in conference. However, as we go to press, the conference committee has not yet met. The reason given for the delay was that there was more difficulty than had been anticipated in reconciling the differences between the staffers of the House and Senate conferees who have by now held a series of preliminary discussions. By the time the next *Intelligence Report* appears, we hope to be able to provide our readers with an account of the final action taken by Congress on this measure.

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agency heads and approved by the attorney general. The order contained a significant number of limitations on what could be permitted under these procedures. In general terms, the new order, Executive Order 12333, retains the same structure, but contains less precise definitions of what the procedures may permit.

Even under the previous order, the significance of the executive order provisions could not be fully understood without analysis of the implementing procedures, some of which were classified in whole or in part. Review of the published procedures under that order reveals that they added significantly to the provisions under which they were promulgated. In the case of the new order, the implementing procedures will assume an even greater importance. If they follow the pattern of their predecessors, they may impose both substantive and procedural safeguards not explicitly set forth in the executive order itself. An overall analysis of the impact of the new executive order in light of concerns about privacy and constitutional values, therefore, cannot properly be made without analysis of these procedures. It is to be hoped that they will be issued promptly by the intelligence agencies and made public in as large a measure as possible.

It is not possible in a limited space to summarize all of the changes in the new executive order that appear to be of potential significance. In brief summary, however, it seems appropriate to call attention to the following matters.

Structure of the Intelligence Community

The new executive orders made a variety of organizational changes that appear to be significant. Executive Order 12333 abolished the rigid National Security Council committee structure embodied in the previous order and replaced it with a provision permitting the NSC to establish such committees as may be necessary. The order also abolished the National Foreign Intelligence Board and the National Intelligence Tasking Center, leaving to the Director of Central Intelligence the flexibility to establish boards or advisory groups as necessary to carry out various intelligence committee functions. The rigid membership provisions that made both the NFIB and the previous administration NSC subcommittees unwieldy have been set aside.

The attorney general is no longer guaranteed by executive order attendance at NSC or NSC committee meetings relating to special activities and sensitive intelligence operations. The order does require, however, that a senior representative of the attorney general be invited to participate in any advisory group to the DCI that deals with other than the substantive intelligence matters. The role of the attorney general in approving the implementing procedures has been changed somewhat by a provision (§ 3.2) requiring the attorney general to provide a statement of reasons for disapproving the procedures of any agency other than the FBI (which is under his jurisdiction). If the attorney general's reasons are other than constitutional or legal, i.e., purely policy, the NSC may resolve the dispute. This provision seems likely to reduce the potential ability of the attorney general to establish unilaterally policy-based limitations on lawful intelligence activities.

The Intelligence Oversight Board has been treated in a separate order, Executive Order 12334. Changes in the reporting standard, to eliminate issues of "improper," but lawful, intelligence activities, appear to diminish the range of the Board's responsibilities.

Goals and Emphasis

Executive Order 12333 contains a strong emphasis on competitive analysis, including a new requirement that the DCI ensure "that appropriate mechanisms for competitive analysis are developed." The new order also, as compared with the previous order, places increased emphasis on counterintelligence and on collection of information on international narcotics activities.

Restrictions on Intelligence Activities

It is in the area of constraints on intelligence activities that the changes contained in Executive Order 12333 are the most extensive in comparison with Executive Order 12036. This, also, judged from press reports, has been the area of greatest controversy: within the administration, between the administration and the congressional oversight committees, and in the public arena. Among the changes made, there are several of indubitably substantive importance. A variety of others are harder to assess. Some areas that were substantively limited under Executive Order 12036 are only required under Executive Order 12333 to be governed by procedures. As noted above, only when these procedures have been issued will it be possible to determine if significant substantive changes in the permitted operations of the intelligence agencies have occurred. In addition to eliminating a certain number of restrictions, this portion of the executive order has been extensively edited and rearranged to produce greater concision. In addition, it has been given more positive tone. That is, in general, the intelligence agencies are authorized to conduct specified activities, but within certain limitations; this contrasts with the approach of the previous order, which generally prohibited such activities outside certain limitations and left the authority for the non-prohibited activities to be implied. Most frequently, however, it appears that the substantive result, in terms of the

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Book Reviews

The Pacific War by John Costello, published by Rawson, Wade, Inc., 630 Third Ave., New York, $24.00

Infamy—Pearl Harbor and Its Aftermath by John Toland, published by Doubleday, Garden City, NY, $17.95

By Your Editor

Both these books are about the war in the Pacific. Of the two, the Costello book is more encompassing, since it covers all the Pacific battles and naval engagements from the Pearl Harbor attack to the dropping of atomic bombs on Hiroshima and Nagasaki. Participants in the Pacific war as well as students of history will find a well chronicled account of all the action.

The first four chapters of *The Pacific War* examine the underlying causes of the conflict which began with the attack on Pearl Harbor. That attack, which was the brain child of Adm. Yamamoto, Chief of the Japanese Combined Fleet, was first reduced to writing by the admiral on January 7, 1941, in a letter to his colleague, the Navy Minister, Adm. Oikawa. Incredibly, by January 27, a mere twenty days later, news of the plan had been communicated to the U. S. Ambassador, Joseph Grew, by his colleague, the Peruvian Ambassador, who heard it from his cook! Equally incredibly, the news was dismissed in Washington as cocktail gossip (see p. 84).

While Costello has the date wrong (he says February 1941), his conclusion is correct, because on January 31 the Office of Naval Intelligence passed on to Adm. Kimmel, Ambassador Grew's dispatch with this misevaluation.

> The Division of Naval Intelligence places no credence in these rumors. Furthermore, based on known data regarding the present disposition of Japanese naval and army forces, no move against Pearl Harbor appears imminent or planned for in the foreseeable future.

Costello sums up the Pearl Harbor intelligence controversy very nicely when he concludes in his last chapter (Unanswered Questions, p. 655):

> The Japanese were able to make their surprise attack on Pearl Harbor because of a breakdown in communications within the service organizations in Washington and the U. S. failure to transmit the complete intelligence situation to the Hawaiian command.

It would be difficult to write a better one-sentence explanation of how and why the Japanese attack succeeded.

Author Costello conjectures as to what *might* have happened had Washington passed on to Hawaii all the intelligence it had in its possession. On page 644 he used two "might haves," one "they might well have," one they "might also have" and one "their suspicions would most certainly have been aroused." No one will ever know what *might* have happened. We can only contemplate John Greenleaf Whittier's words from *Maud Muller:*

> For all the sad words of tongue or pen
> The saddest are these: 'It might have been'!

John Toland's book, *Infamy*, by way of contrast, concentrates on Pearl Harbor and concludes, on the basis of alleged discovery of new evidence, that a conspiracy existed in Washington, led by the president with high-ranking military and members of his cabinet as co-conspirators, to deny the certain knowledge they possessed that an attack on Pearl Harbor was coming at 0800 on December 7. According to a story much hyped by Doubleday, the publisher, which appeared in *The New York Times*,

> Historian John Toland says he has found evidence that the Navy discovered Japanese aircraft carriers steaming toward Hawaii five days before the Japanese attacked Pearl Harbor on December 7, 1941.

Lawyers, who are used to marshalling and evaluating evidence, would be hard put to come to Toland's conclusions based on the thin and indigestible gruel he sets forth.

First, he says Adm. (then Capt.) Johan E. M. Ranneft, the Dutch naval attaché in Washington, visited the office of the Director of Naval Intelligence, Capt. Wilkinson, on December 2, 1941, and was told by an unnamed officer (indicating a chart) that the Japanese carrier task force was halfway between Japan and Hawaii (p. 283). Adm. Ranneft, a neighbor and friend of this reviewer, was 95 years of age and in a nursing home when he gave the interview to author Toland (he has since died). The problem with this evidence is that officers then on duty in ONI, including this one, know of no wall chart plot of the Japanese fleet which existed anywhere in the office. They *do* know, however, that *no one in the Office of Naval Intelligence prior to the attack on Pearl Harbor had any evidence as to the location of the Japanese task force nor was the slightest evidential hint that such evidence existed brought out at any of the Pearl Harbor investigations.*

Why didn't they know? Simply, because from the time the Japanese task force left mainland Japan for the staging area in the Kuriles, it maintained strict radio silence, as it did for the entire passage from Hitokappu Bay to the launch point north of Oahu. The maintenance of such radio silence, as any naval officer who has taken part in a strike or invasion knows, is standard operating procedure. Woe betide him who breaks it in *any* navy!

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In spite of the knowledge and experience of all who have taken part in an invasion and the specific denial by Japanese officers who participated in the Pearl Harbor attack (subsequent to the publication of Toland's book), that the task force ever broke radio silence, we are expected to believe that two separate pairs of radio operators tracked the invasion force all across the Pacific! The first was on the Matson liner Lurline en route from the U. S. west coast to Honolulu on December 2, 1941. Allegedly, they received queer radio signals in the northern Pacific, got cross bearings and decided they had tracked the missing Japanese carriers. (How they as civilians not privy to intelligence knew they were missing is unexplained.)

On arrival in Honolulu on the morning of December 3, the two radio operators were alleged to have passed on their intercept information to the downtown intelligence office of the 14th Naval District. There is, of course, no record that such information was ever received or passed on.

At the same time, according to Toland, two radio intercept operators in the 12th Naval District Intelligence Office in San Francisco "had tracked the Japanese carrier force to a position northwest of Hawaii." They duly reported their information to the district intelligence officer and *assumed* it had been passed on to ONI and to the president through Harry Hopkins. Once again, no record can be found of the report or the event.

On the basis of such thin and undocumented evidence author Toland avers that President Roosevelt

> was faced with the most momentous decision of his life when a number of reports to Washington indicated that the missing Kido Butai (task force) was heading eastward toward Hawaii.

He then concludes on the basis of a letter written in 1973 by a man named Stahlman that Stahlman had been told by Secretary of Navy Knox (who died in 1944) that he, George Marshall, Secretary of War Stimson, Adm. Stark and Harry Hopkins had spent most of the night of December 6 at the White House with the President!

> All [according to Toland] were waiting for what they knew was coming: an attack on Pearl Harbor.

Conversations with watch officers who were on duty in the White House Map Room that evening, including Lt. Schulz (see pp. 232 and 302 and note the discrepancy in account), and other evidence as to the whereabouts of the so-called co-conspirators on the night of December 6—some of it in Toland's book—give the lie to such an assertion.

A postscript to these book reviews is an article which appeared in *The Washington Post* on Wednesday, April 28. It needs no further explanation!

> Historian John Toland, 69, collapsed at the podium during a Monday night lecture at the National Archives following a salvo of hostile questions from fellow author John Costello.
>
> The Pulitzer Prize-winning author of a dozen books, Toland was speaking on his latest, *Infamy*, which claims that the U. S. government knew about the Pearl Harbor attack five days before it occurred. During a question period afterward, Costello, author of the recent *The Pacific War*, rose to criticize Toland's sources and intentions. It was "kind of *ad hominem*," said Archives spokesperson Jill Merrill, "basically accusing him of advocacy instead of history. Then there were several other questions and suddenly John fell supine in a matter of one second. Everyone screamed for a doctor in the house," and an ambulance was called. Toland regained consciousness before being taken to Georgetown University Hospital, where he was soon released, blaming the collapse on a cold, the rigors of his book tour and the bright lights.
>
> While Toland was still lying on the floor, Merrill said, she jokingly told him that "even the Archives doesn't need this kind of publicity." "Yes," replied the fallen scribe, "and what will I do for an encore?"

For an encore this reviewer suggests author Toland, who undoubtedly is a talented writer, pick a different subject. But, if you believe in the conspiratorial theory, read *Infamy*. If you just want to learn the known facts about the Pacific war, read Costello.

Workshop to be Presented At ABA Annual Meeting

The Standing Committee on Law and National Security will present a workshop, entitled ***Litigating National Security Issues,*** at the ABA Annual Meeting in San Francisco. It will be held on Monday, August 9, from 2 to 5 p.m. at the Holiday Inn-Union Square.

Selected by President Brink as a Showcase Program, the workshop will address the difficult legal and practical issues that a national security issue presents in both civil and criminal litigation. Speakers will be from both government and the private bar. Full details will be carried in the June issue of the *Intelligence Report*.

Recent FOIA Appeals Cases In the District of Columbia

The Freedom of Information Act (FOIA), which remains under consideration for revision by the Congress (as described in recent issues of the *Intelligence Report*), has produced a plethora of legal decisions and appeals therefrom. Since the District of Columbia is also the seat of the federal government, the Circuit Court of Appeals of the District of Columbia (CADC) has had more than its mathematical share of matters. There are set out below some recent cases.

In *Federal Bureau of Investigation* v. *Abramson*, 658 F. 2d 806 (CADC 1980), the CADC had for decision the request under FOIA of Abramson, a journalist, to the FBI for certain FBI documents pertaining to various public figures which documents had been transmitted to the White House (during the Nixon administration). There is a FOIA exemption for records compiled for law enforcement purposes if they constitute an unwarranted invasion of personal privacy. The lower court found that disclosure would constitute an unwarranted invasion of personal privacy. This decision was appealed from and the CADC remanded because any consideration of whether disclosure would constitute an unwarranted invasion of personal privacy was premature until the documents had been shown to be investigatory records compiled for law enforcement purposes. The case is now before the Supreme Court (cert. granted, 452 U.S. 937 (1981); argued January 11, 1982).

In *United States Department of State* v. *The Washington Post Company*, 647 F. 2d 806 (CADC 1981), there was for decision a lower court ruling that the Department of State had to release records which would indicate whether two individuals residing in Iran were United States citizens. State had resisted disclosure based on a FOIA provision exempting from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." The lower court had held that citizenship was not an "intimate" personal detail and hence not exempt. The CADC affirmed stating that, although there may be some danger to individuals, the Congress did not design in FOIA any exemption to allow the withholding of information on the basis of the physical security of persons overseas. (It is noted that there are overtones of the substance of the Intelligence Identities Protection Act in this case.) The case is now on appeal (cert. granted, 454 U.S. ____, (Nov. 9, 1981)).

In *Central Intelligence Agency* v. *Holy Spirit Association for Unification of World Christianity*, 636 F. 2d 838 (CADC 1980), the court had for decision a lower court ruling protecting most of the CIA documents not previously released by the CIA to the plaintiff church (the church had asked for all CIA records relating to the church or any of its members). The CIA desired not to release about 35 documents generated by the Congress and sent to the CIA, and 15 which were generated by the CIA and sent to the Congress.

The CADC reversed stating that neither sets of documents were congressional records immune from disclosure, that the CIA was entitled to withhold certain documents in carrying out its duty to protect intelligence sources, that the lower court properly determined that an *in camera* review of the documents was necessary, and that the lower court could not properly accept an offer of an *in camera* review of an affidavit from the CIA in place of such an inspection if the CIA's claims in the affidavit were conclusory, lacked specificity, or were too vague or sweeping. A petition for certiorari to the Supreme Court was filed. However, the plaintiff asked to withdraw and mooted the entire case.

Larry Williams

Printed below is a press release issued by the National Intelligence Study Center on the occasion of its award for the 1981 issuances of the ***Intelligence Report.***

NATIONAL INTELLIGENCE STUDY CENTER

Award for Journalistic Articles

The National Intelligence Study Center Award for outstanding journalistic contributions on the subject of American intelligence is herewith presented for the monthly issuances for 1981 of the *Intelligence Report* of the Law and National Security Standing Committee of the American Bar Association.

First issued in 1979, the *Intelligence Report* represents the Bar Association's desire to focus the legal expertise of its membership on the legislative and legal problems of intelligence. The publication presents succinct discussions of current intelligence matters before the Congress and the courts, as well as other matters of intelligence interest in these fields. These monthly issuances, with an ever widening audience, make an important and useful contribution to the field of intelligence knowledge and scholarship.

Particular mention should be made of the two successive editors of the *Intelligence Report*, Mr. Raymond J. Waldmann and Admiral William C. Mott, and their associates, Mrs. Florence D. Bank, Mr. David Martin, and Mrs. Mary Lee.

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bounds of permissible activities, is the same. Finally, some of the changes in language that appear to have substantive consequences may well be the result of editorial modification without substantive intent.

With this preamble, it is worth noting several provisions that deserve careful consideration – either because they contain substantive changes or because they seem to have attracted controversy:

The provisions in Section 2.3 of Executive Order 12333 on collection, retention and dissemination of information concerning United States persons have expanded the permissible categories for agencies other than the FBI (which was basically unrestricted in this regard under Executive Order 12036). A particularly interesting provision is found in Section 2.3(b), which seems to permit agencies other than the FBI to engage in clandestine collection within the United States of "significant foreign intelligence." The effect of this provision is somewhat unclear since it does not appear to override limitations found elsewhere in the order on the specific collection techniques that might be used for such purpose.

The provisions on physical search (Section 2.4(b)), in contrast to Executive Order 12036, permit the CIA to search in the United States the personal property in its possession of non-United States persons.

The provision on physical surveillance (Section 2.4(c)) eliminates certain Executive Order 12036 limitations on what the implementing procedures can authorize. In particular, present or former employees and intelligence contractors and their employees can be the objects of physical surveillance without any limitation as to purpose, as can applicants for any such employment or contracting. Physical surveillance of United States persons abroad appears to be permitted for all purposes, except in the case of collection of foreign intelligence, for which the purpose must be to "obtain significant information that cannot reasonably be acquired by other means." In contrast, Executive Order 12036 limited such surveillance outside the United States to United States persons who were reasonably believed to be acting on behalf of a foreign power, engaging in international terrorist activities or engaging in a narcotics production or trafficking.

The Executive Order 12036 provisions on monitoring and mail surveillance are covered in a single provision, in the introductory paragraph of Section 2.4, providing that "(a)gencies are not authorized to use such techniques as electronic surveillance, unconsented physical search, mail surveillance, physical surveillance, or monitoring devices unless they are in accordance with procedures established by the head of the agency concerned and approved by the attorney general. Such procedures shall protect constitutional and other legal rights and limit use of such information to lawful government purposes." It remains to be seen how the open-ended phrase "such techniques" will be interpreted.

The provisions on undisclosed participation in organizations in the United States (Section 2.9) eliminate the requirement that the type of participation be approved by the attorney general and set forth in a public document. Such participation still, however, must be governed by procedures approved by the attorney general.

The provisions on relations with law enforcement authorities, which under the previous order were quite restrictive, have been expanded by a catch-all provision in Section 2.8(d) authorizing agencies to "(r)ender any other assistance and cooperation to enforcement authorities not precluded by applicable law." This presumably does not detract from the provision of 504(d)(3) of the National Security Act of 1947 that the CIA shall have no police, subpoena, law-enforcement powers or internal-security functions.

Finally, considerable attention has been drawn to the definition of "special activities" in Section 3.4(h), which appears to permit the conduct of such activities within the United States as long as they (i) are in support of national foreign objectives abroad and (ii) are not intended to influence United States political processes, public opinion, policies or media.

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